No. 89-1193

Supreme Court, U.S.
FILED
APR 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

B & H INDUSTRIES OF SOUTHWEST FLORIDA, INC.

Petitioner,

V.

RICHARD A. DIETER et al.,

Respondents.

PETITIONER'S REPLY TO THE NEW ISSUE RAISED BY RESPONDENT'S OPPOSITION TO THE PETITION

Merrill N. Johnson
800 Harbour Drive
Naples, Florida 33940
(813) 262-8502

Attorney for Petitioner

BEST AVAILABLE COPY

No. 89-1193

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

B & H INDUSTRIES OF SOUTHWEST FLORIDA, INC.

Petitioner

v.

RICHARD A. DIETER et al.

Respondents.

STATEMENT PURSUANT TO RULE 29.1

Petitioner B & H Industries of Southwest Florida, Inc. ("B & H") has no parent or subsidiary company.

SUMMARY OF ARGUMENT

In respondent's brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the

Eleventh Circuit ("Opposition"), respondents Richard A. Dieter and Dieter General Contractor, Inc. ("Dieter") make the illogical argument that because B & H failed to notify the District Court to include the trial exhibits in the record on appeal, the record before the Court of Appeals was ipso facto made proper and complete.

The argument is unpersuasive for two reasons: first, B & H had no duty to notify the District Court clerk to transmit the trial exhibits; and second, it is well established that an appellate court has no authority to reverse a district court's findings of fact without first reviewing the entire record on appeal. In this case it is undisputed that the Court of Appeals did not have the entire record on appeal as required by Fed. R. App. P. 10(a).

ARGUMENT

Dieter contends that the Eleventh Circuit's Internal Operating Procedure under its Rule 11-3 ("I.O.P.") (Opposition, p. 5) places an obligation on B & H to notify the District Court clerk of any exhibits to be transmitted to the Court of Appeals. (Opposition, pp. 10, 14-15)

However, the I.O.P. places no such obligation on either petitioner-appellee or respondent-appellant. The I.O.P. (Opposition, p. 5) deals with a situation where documents or exhibits were not filed with the district court clerk. In this case petitioner and respondent knew the clerk had possession of all the trial exhibits as stated in the Petition on pp. 23-25. Furthermore, Rule 11-3, Eleventh Circuit Court of Appeals (Appendix A84), provides that it is the District Court clerk who is responsible for transmitting a complete record to the Court of Appeals.

Regardless of who was responsible, the fact remains that the trial exhibits remained in the vault of the District Court in Tampa and the Court of Appeals never saw the trial exhibits. (Petition, pp. 32-34). It is not disputed that under Rule 10(a) (Appendix, A81) the record on appeal must include the trial exhibits to be complete. Nothing in the Eleventh Circuit Rules or its I.O.P. alters Rule 10(a)'s requirements for a proper and complete record on appeal.

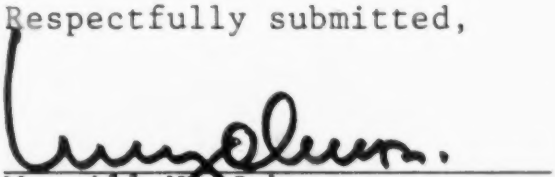
This Court has repeatedly stated that under Rule 52(a), an appellate court can reverse district court findings of fact as "clearly erroneous" only upon a review of the entire evidence. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 123 (1968); Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573-74 (1985). Despite its assertions to the contrary (Appendix, A6, A9 and A12), the Panel did not review the entire record.

Finally, contrary to Dieter's assertion that the Petition does not identify even one trial exhibit the presence of which would show error on the part of the Panel (Opposition, p. 15), B & H's Petition discusses that very point on pages 45 and 59-60.

CONCLUSION

B & H submits that the Petition, the Opposition and this Reply have thoroughly presented all of the issues and, accordingly, the case is appropriate for summary disposition on the merits under this Court's Rule 16.1. Alternatively, B & H requests the Court to grant the writ and order the case to stand for briefing and oral argument pursuant to this Court's Rule 16.2.

Respectfully submitted,



Merrill N. Johnson
800 Harbour Drive
Naples, Florida 33940
(813) 262-8502
Attorney for Petitioner